EMPLOYMENT TRIBUNALS

Claimant: **Mr Esase Awazou**
Respondents: **Abellio London Limited**

Heard at: **London South** **On:** **4, 5 April 2017 & 23 April 2017 (In Chambers)**

Before: **EMPLOYMENT JUDGE CORRIGAN**
Members: **Ms BC Leverton**
Mr M Walton

Representation
Claimant: Mr C Adiole, Counsel
Respondents: Mr M Shepherd, Counsel

RESERVED JUDGMENT

1. The Claimant was not automatically unfairly dismissed.

2. The Tribunal does not find that there has been a contravention of the Equality Act 2010 (race discrimination) by the Respondent.

3. The Respondent did not breach the Claimant's contract.

4. The Claimant's complaints are dismissed.

REASONS

1. By his complaint dated 31 March 2017 the Claimant brings complaints of automatic unfair dismissal (s103A), direct race discrimination and breach of contract.

Issues

2. The issues were discussed with the parties and agreed to be:

Automatic unfair dismissal

2.1 Did the Claimant make a disclosure of information? The Claimant asserts he did so on 3 August 2016, 5 August 2016, 8 October 2016 and 11 October 2016.

2.2 Did the Claimant have a reasonable belief that the disclosure was made in the public interest?

2.3 Did the Claimant have a reasonable belief that the disclosure tended to show one or more of the following:

2.3.1 that the Respondent has failed, is failing or is likely to fail to comply with a legal obligation?

2.3.2 that the health and safety of the public has been, is being or is likely to be endangered?

2.3.3 That the environment has been, is being or is likely to be damaged?

2.4 Was the Claimant dismissed as a result of making the above disclosure(s) or was he dismissed because he failed his probation and/or was not qualified for the position?

Race discrimination

2.5 Did the Respondent treat the Claimant less favourably than his comparator, Robert Praneskij?

2.6 Was there a material difference between the circumstances of the Claimant and those of Robert Praneskij?

2.7 Was the less favourable treatment because of race?

Breach of contract

2.8 Was the Claimant not paid his contractual pay?

3. It was agreed with the parties that as the Claimant was requesting reinstatement that liability would be decided first and remedy would be dealt with at a separate remedy hearing, if appropriate.

Hearing

4. We heard evidence from the Claimant on his own behalf. Mr Kevin Warner (Auto Electrician at Walworth Bus Depot) also gave evidence on the Claimant's behalf.

5. On behalf of the Respondent the Tribunal heard evidence from Mr Mike Harvey (Fleet Manager) and Mr Andrew Worboys (Finance Director).

6. There was an agreed bundle. The representatives made oral submissions and the Respondent's representative prepared a written submission.

7. Based on the evidence heard and the documents before us the Tribunal found the following facts.

The Facts

8. The Claimant describes himself as Black African. He had worked for the Respondent on and off through agencies for about 9 years. He worked at Battersea Depot from April 2016 via an agency until his employment commenced.

9. On 2 July 2016 he commenced employment with the Respondent subject to a six month probation period. He was employed as Auto Electrician at the Battersea Depot. The Claimant was recruited to this position via Retinue Agency, a derivative of the Claimant's agency. Mr Harvey had requested a qualified electrician. The Claimant had told his agency that he was qualified as in his mind his length of experience is commensurate with being qualified. He gave them his CV. In fact the Claimant does not have a formal qualification and has learned his trade on the job.

10. We accept Mr Harvey's evidence that the Respondent requires qualified electricians to be working on public service vehicles. By qualified Mr Harvey means qualified to Level 3 NVQ or equivalent.

11. The Respondent gives an undertaking to the relevant supervisory bodies such as the Traffic Commissioner, DVSA, and Transport for London to keep all its vehicles in fit and serviceable condition. Failing to do so could involve a public inquiry and could risk the Respondent's licence. Mr Warner, the Claimant's witness, confirmed he had had to provide his own qualifications and that he did not know of another auto electrician working for the Respondent who was not qualified.

12. The Claimant gave inconsistent evidence about whether he had represented to Mr Harvey that he had qualifications. He says on the one hand Mr Harvey knew he was not qualified and was going to send him on training. On the other hand he says he held himself out as qualified based on his length of experience which in his view means he is qualified. We accept Mr Harvey's evidence that although he had concerns he did not know that the Claimant was not qualified until the probationary

meeting (addressed below), when it came as a surprise when the Claimant candidly accepted he was not qualified.

13. On 6 July 2016 the Claimant signed the notification of new employee form which stated his rate of pay as £16.14 per hour, and the number of basic hours as 40 (page 48). That accorded with the Respondent's standard skilled hourly rates for those employed on a basic 40 hour pattern at page 228. The Claimant did not have sight of these during his employment but it demonstrates the Respondent had standard pay rates.

14. The Claimant did not receive his formal offer letter until 12 August 2016 which gave an incorrect rate of pay of £17.18 per hour. This was a mistake as this is the rate of pay for shift work, not those working the basic 40 hour week. The Claimant received weekly payslips before and after this date up to 7 October 2016 showing he was paid the correct rate he had agreed when he signed the new employee form. He did not take any issue with this.

15. He did not receive his written contract until 30 September 2016 which also gave the salary of £17.18 per hour and stated the standard working week was 40 hours but that he might be on a varied rota pattern. In the covering letter to the contract the Respondent requested a number of documents including the standard documents usually requested upon commencement of employment (eg evidence of right to work in the UK) and this list did not include evidence of qualifications. However, Mr Harvey requested a copy of the Claimant's formal qualifications from the Claimant and the agency on a number of occasions from the outset of the Claimant's employment. This is confirmed in the email (p110) dated 3 October 2016 Mr Harvey sent to Mr Andrew Stream of Retinue which said:

    "as per our previous conversations, and conversation today regarding the request to verify [the Claimant's] qualifications.

    To date we have not received any documents from yourselves, to clarify if [the Claimant] is a qualified electrician, or holds any documentation in the field of which he is employed.

    Can you get this information over to me as soon as possible, as this was requested months ago, and to date we have not received any documentation."

    Mr Harvey was also told by the agency that they had tried to contact the Claimant. We accept his evidence, consistent with this email, that he had been trying to obtain copies of the Claimant's qualifications for some time and had a growing concern as to why he was not getting the relevant documentation.

16. The contract was signed by the Claimant on 5 October 2016.

17. We turn now to the alleged disclosures and address them together although the Claimant alleges they were made over a period from August up to 11 October 2016. The Claimant asserts that on 3 August 2016 he reported verbally to Marc Stirling,

his Shift Manager, that buses were being sent out on the road that were unfit because they were being put on the running repairs schedule. He says he also showed the defective parts of a bus by showing the photograph at page 151.

18. The Claimant also asserts that on 5 August 2016 he and Marc Stirling together went to report dangerous gas emissions by those unfit vehicles to Mike Harvey.

19. He says on 8 and 11 October 2016 he reported to managers, including Mike Harvey, a blocked exhaust (p150) and that it was wrong to send unfit buses out to service as they were doing.

20. We accept Mr Harvey's evidence that he had no knowledge of this and that the Claimant made no such disclosures to him. We note that the Claimant did not mention any alleged disclosures until his claim form. He did not mention the two in October 2016 until his witness statement for these proceedings, despite being questioned in some detail about the dates of the disclosures at the preliminary hearing and being required to set out full particulars after that hearing. We note that he did raise the fact that buses were being sent out with faults in his probation/dismissal meeting, in the written appeal of his dismissal and both appeal meetings. However the context on all of those occasions and repeated many times by the Claimant was that he was not able to work on those buses because they were sent out. His performance was being questioned and his complaint related to the inability to perform his tasks properly because the buses were being sent out and he could not repair them. There was no reference to a concern about public health and safety or dangerous fuel emissions (pp 111,117, 130,131,136,138,155). We note the Claimant had photographs of alleged faults dated 3 August 2016 and 8 October 2016 (pp150-151) and that he used photographs to raise faults with managers and to order parts (eg p165). We also note that it is not possible to know the exact nature of a fault without a printed diagnostic, nor if fuel emissions are dangerous unless a smoke test has been performed. The Claimant does not say he showed either of these to his managers.

21. We find the Claimant did show his managers photographs of faults as was his working practice in the performance of his duties and that he did object to buses being sent out which he wanted to work on. We do not accept that he raised a risk to public health and safety or dangerous fuel emissions.

22. The Claimant did go onto the shift pattern from 14 October 2016 and was paid £17.18 per hour. This is in accordance with the standard pay rates for those working on a shift basis on page 228.

23. On 28 October 2016 the Claimant received the letter at page 110A dated 22 October 2016 inviting him to a meeting on the same day (28 October). The letter includes a request to bring any professional qualification as per his trade as previously requested. This probation meeting was earlier than required because Mr Harvey had concerns, including in relation to the Claimant's qualifications.

24. The meeting is recorded at pages 111-112. There is a dispute about the accuracy of the record but it is undisputed that during the meeting the Claimant said he had

not provided evidence of qualifications as he did not have any. He said he learnt his trade in the garage and, when asked by Mr Harvey if he had attempted to do a course, he said he had not. Mr Harvey was shocked at the Claimant's response and took a break to consider what to do. He decided he had to terminate the employment, giving notice it would end on 2 November 2016. Mr Harvey considered the lack of qualification was an insurmountable difficulty as it put the company at risk if there was a mishap as a result of electrical problems. This was confirmed by letter on 1 November 2016 (page 113).

25. There were other issues raised with the Claimant but the reason for the dismissal was the lack of qualifications to do the job. The leaver form at page 114 records the reason for termination as being that he could not produce qualifications for the job as an electrician and so did not pass probation.

26. The Claimant appealed and it was dealt with by Mr Worboys. The Claimant did not challenge that he did not have qualifications but suggested that Mr Harvey knew and was paying him less as a result. Mr Worboys spoke to Mr Harvey who confirmed the pay was the standard pay, and that he had been waiting for certificates to be supplied by Retinue.

27. The Claimant attended a further meeting on 5 January 2017 and was informed the dismissal was correct as he had been employed as a qualified engineer. Mr Worboys confirmed the Claimant had been paid at the fully qualified rate, having checked with payroll. The decision and reasons were confirmed in writing by letter dated 23 January 2017 which confirmed that the decision was upheld because without the qualifications the Claimant had insufficient knowledge in diagnostics and legally could not sign off rota documents. He was therefore not able to complete all tasks required from a fully qualified electrician without supervision.

28. The Claimant has relied upon a comparator Robert Praneskij who is white. The Claimant raised during the appeal process that Mr Praneskij had been treated differently. Mr Praneskij was employed as a Bus Wheel Cleaner and paid the semi-skilled rate of £14.49 per hour. He had enrolled himself on a university degree at his own expense and made a request to Mr Harvey to be allowed to train on the job. This was approved and he became a trainee auto electrician on the semi-skilled rate of pay. His work was supposed to be supervised and both parties accept that this was supposed to be done by the Claimant. The Claimant alleges that Mr Praneskij was allowed to sign off documentation but we have seen no evidence of this and in any event this must have been when it was the Claimant who should have been supervising his work.

29. Both managers were aware of the Respondent's whistleblowing policy and were prepared to follow it and investigate should an issue be brought to their attention.

Relevant law

Automatic Unfair Dismissal

30. Section 103A Employment Rights Act 1996 provides that an employee is to be treated as automatically unfairly dismissed if the principal reason for the dismissal is that the employee made a protected disclosure.

31. A "qualifying disclosure" is defined in section 43B as:

> **...any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following_**
> **...**
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> **...**
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered,**
>
> **(e) that the environment has been, is being, or is likely to be damaged...**

32. The Tribunal must therefore consider whether the Claimant made a disclosure of information, whether he believed it tended to show one of more of the matters in section 43(b), (d), and (e), and whether that belief was reasonable (*Easwaran v St George's University of London* [2010] UKEAT 0167/10). The tribunal must also ask whether the worker believed that the disclosure was in the public interest and whether, if so, that belief was reasonable (*Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* [2017] EWCA Civ 979).

Race Discrimination

33. Section 13 Equality Act 2010 states:

> **A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

Race is a protected characteristic. Section 23 provides that there must be no material difference in the circumstances of any comparator.

34. Section 136 provides that if there are facts from which the tribunal could decide, in the absence of any explanation, that a person A unlawfully discriminated against B, then the court must hold that contravention occurred unless A shows that A did not unlawfully discriminate against B. Section 136 does not put an initial burden on the employee but requires the tribunal to consider all the evidence, from all sources, at the end of the hearing (*Efobi v Royal Mail Group Ltd* UKEAT/0203/16).

Conclusions

Race Discrimination

Did the Respondent treat the Claimant less favourably than his comparator Robert Praneskij in dismissing him?

35. The Claimant was dismissed and Robert Praneskij was not.

Was there a material difference between the circumstances of the Claimant and those of Mr Praneskij?

36. There were a number of material differences between the circumstances of the Claimant and Mr Praneskij.

37. The two were not employed in the same role. The Claimant was employed as a qualified auto electrician. Mr Praneskij was employed in a completely different semi-skilled role, namely a Bus Wheel Cleaner. He then enrolled himself into a university degree in a related subject involving electronics/mechanics at his own expense. He made a request to the Respondent to become a trainee auto electrician.

38. Mr Praneskij never held himself out as a qualified auto electrician and was paid the lower semi-skilled rate and supervised as a consequence.

39. The Claimant held himself out as a qualified auto electrician which was not correct. He may have experience but he does not hold the qualification. He was paid the rate of a qualified electrician and expected to work unsupervised and supervise others including Mr Praneskij. He had never attempted to undertake a qualification.

40. The two are in completely different situations and Mr Praneskij is not an appropriate comparator.

Was the less favourable treatment because of race?

41. There is no evidence from which we could conclude that a white person holding themselves out as a qualified electrician when they were not in fact so qualified would not have been treated the same way as the Claimant and dismissed.

42. The evidence is overwhelming that the Claimant was dismissed because he did not have the relevant qualification. He held himself out as being qualified when he was not. We accept the Respondent had little choice but to dismiss. It had nothing whatsoever to with his race.

Automatic Unfair Dismissal

Did the Claimant make a disclosure of information? Did the Claimant have a reasonable belief that the disclosure was made in the public interest? Did the Claimant have a reasonable belief that the disclosure tended to show one or more of the matters in section 43 (b) (d) and (e)?

43. It follows from our factual findings at paragraphs 20 and 21 above that the Claimant did not make protected disclosures. He did tell his managers about faults with the buses and/or show them photographs of these as part of his working practices in the performance of his duties. He did object to buses being sent out as it meant he could not work on them in the context of being challenged about his performance. We have not accepted that he raised a risk to public health and safety or dangerous fuel emissions.

44. We find that at the time (3 and 5 August and 8 and 11 October) the Claimant did not disclose the information in the belief it was in the public interest or because in his reasonable belief it tended to show that the health and safety of the public was likely to be endangered or that there were dangerous emissions.

Was he dismissed as a result?

45. In any event, as we have found above, the evidence is overwhelming that the Claimant was dismissed for not having the qualifications required for his role. We have found that Mr Harvey, who made the decision, was not aware of any alleged protected disclosures.

Breach of contract

Was the Claimant paid his contractual pay?

46. It was agreed the Claimant's pay would be £16.14 per hour whilst working a 40 hour week as per the new employee form signed on 6 July 2016 (page 48). This increased to £17.18 per hour once he worked a shift pattern. These are both the standard skilled pay rates paid by the Respondent (page 228).

47. The rate in the Claimant's offer letter and contract was incorrect for a 40 hour week.

48. We have found the Claimant was aware his rate should have been and was £16.14 per hour until he moved to the shift pattern. Not only did he not raise any issue with the fact that he was paid at that rate, he has relied on the rate of £16.14 being the rate he agreed with Mr Harvey in respect of his other claims.

49. The agreed rate was £16.14 per hour and that was what he was paid.

50. If we are wrong about this and the offer letter and the written contract varied the rate to £17.18 per hour then we find the Claimant nevertheless accepted the lower rate of £16.14 by continuing to work at that rate without raising any issue. He did not object to that rate in the appeal but rather relied upon it in attempting to argue that Mr Harvey had deliberately paid him a lesser rate because he was not qualified.

Next steps

51. The Respondent has indicated an intention to apply for costs against the Claimant. In any event the Tribunal must consider whether the Claimant has been

unsuccessful for substantially the reasons given in the deposit order, and if so, whether he should be treated as having acted unreasonably and the deposit paid to the Respondent.

52. The Respondent has 28 days from the date this Judgment is sent to the parties to make the application for costs, which should be copied to the Claimant. The Respondent has already provided an indication of what is likely to be in the application.

53. The Claimant should respond within 14 days of receipt of the Respondent's application with any representations he wishes to make including in respect of his ability to pay, copied to the Respondent. The Claimant should also address the issue of the deposit above and whether he asks that the application be dealt with in writing or at a hearing.

54. Within 7 days of receipt of the Claimant's representations the Respondent should indicate whether the Respondent asks that the application for costs and decision in relation to the deposit be dealt with in writing or at a hearing.

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Employment Judge Corrigan
22 May 2018